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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1346

LORILLARD, A DIVISION OF LOEW'S THEATRES, INC.,

Petitioner,

v.

FRANCES P. PONS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent Frances P. Pons respectfully opposes the petition for writ of certiorari in this proceeding, seeking to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this cause on February 2, 1977.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is not yet reported, but is set out in the petition for certiorari (App. 2a-7a). The opinion of the United States District Court for the Middle District of North Carolina is reported at 69 F.R.D. 576, and 13 F.E.P.Cas. 444, and is set out in the petition for certiorari (App. 7a-12a).

JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. sec. 1254(1). The judgment of the United States Court of Appeals for the Fourth Circuit was entered on February 2, 1977. The petition for certiorari was filed within 90 days of that date.

QUESTIONS PRESENTED

Whether either the Seventh Amendment, or the Age Discrimination in Employment Act (29 U.S.C. sec. 626), requires a jury trial upon demand of one of the parties in an action under that statute for damages and injunctive relief.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Seventh Amendment to the Constitution of the United States provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

2. The Age Discrimination in Employment Act, 29 U.S.C. sec. 626(b) and (c) provide in pertinent part:

> (b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided for in sec. 211(b), 216 (except for subsection (a) thereof), and 217 of this title and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided,

> That liquidated damages shall be payable only in cases of willful violation of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid mimimum wages or unpaid overtime compensation under this section.
>
> (c) Any person aggrieved may bring a civil action in any competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter:
> . . .

STATEMENT OF THE CASE

This is an action brought under the Age Discrimination in Employment Act of 1967, 29 U.S.C. sec. 621, et seq. The complaint prays for "monetary damages" consisting of wages from date of discharge to date of judgment, together with an equal amount of liquidated damages; and the complaint also requests an injunction requiring that plaintiff be reinstated

as an employee of defendant. A jury trial demand is set out in the complaint.

Defendant moved to strike plaintiff's demand for jury trial. The United States district Court for the Middle District of North Carolina entered a memorandum opinion ruling in defendant's favor and entered an order striking plaintiff's demand for jury trial. The district court certified this issue for interlocutory appeal to the United States Court of Appeals for the Fourth Circuit, and that court granted plaintiff's petition for permission to appeal.

While the case was pending in the court of appeals, plaintiff filed a motion to amend the complaint setting forth a claim for punitive damages. This motion was remanded by the court of appeals for presentation to the district court.

The United States Court of Appeals in an opinion by Senior Circuit Judge Albert V. Bryan reversed the district court, holding that plaintiff is entitled to a jury trial by virtue of the Seventh Amendment. Circuit Judge Butzner wrote a concurring opinion in which he stated his view that plaintiff's right to jury trial was derived from a construction of the Age Discrimination in Employment Act itself, and that recourse to the Seventh Amendment is not necessary.

REASONS FOR DENYING THE WRIT

THE DECISION OF THE COURT OF APPEALS WAS PLAINLY REQUIRED BY THIS COURT'S DECISION IN CURTIS v. LOETHER, 415 U.S. 189 (1974), AND A PROPER CONSTRUCTION OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT ITSELF, AND SHOULD NOT BE DISTURBED.

The petition for certiorari correctly points out that the United States Court of Appeals for the Sixth Circuit has decided a case, Morelock v. NCR Corp., 546 F.2d 682 (1976), which is directly in conflict with the decision of the United States Court of Appeals for the Fourth Circuit in this case. The decision in the present case was clearly correct and should not be disturbed, however. Should a petition for certiorari be filed in the Morelock case, that case should be summarily reversed.

The Age Discrimination in Employment Act of 1967 specifically provides for the granting of appropriate "legal or equitable relief." 29 U.S.C. sec. 626(b),(c). The enumerated specific forms of relief are, "including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid mimimum wages or unpaid overtime compensation . . ." 29 U.S.C. sec. 626(b).

Section 626(b) also incorporates by reference the private remedy provisions of the Fair Labor Standards Act, 29 U.S.C. sec. 216(b), that "Any employer who violates the provisions of section 206 or 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid mimimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages."

Under section 216(b) the courts have uniformly held that there is a right to a trial by jury. McClanahan v. Mathews, 440 F.2d 320 (6th Cir. 1971); Wirtz v. Jones, 340 F.2d 901 (5th Cir. 1965); Olearchick v. American Steel Foundries, 73 F.Supp. 273 (W.D.Pa. 1947); Wirtz v. Turner, 330 F.2d 11 (7th Cir. 1964).

The term "legal relief" set out in the Age Discrimination in Employment Act clearly relates to the enumerated remedy of "enforcing the liability for amounts deemed to be unpaid mimimum wages or unpaid overtime compensation under this section," and also may relate to other types of legal claims, such as common law damage claims, which are not specifically enumerated in the statute.

The Congressional intent on the question of availability of jury trial is plain from the face of the statute. Both legal and equitable relief are specifically mentioned in the section on remedies, and Congress must be deemed to have known the consistent case law rule affording jury

trials under the private remedy provision of the Fair Labor Standards Act, when that provision was incorporated by reference into the Age Discrimination in Employment Act. There is nothing inconsistent with this result to be found in the legislative history.

In contrast, Title VII of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000e-5(g), refers only to injunction and similar equitable remedies and "any other equitable relief as the court deems appropriate." The legislative history of Title VII makes it clear that neither its supporters nor its opponents anticipated that jury trials would be available under this law. United States Equal Employment Opportunity Commission, Legislative History of Titles VII and XI of Civil Rights Act of 1964, pp. 2043, 2046-2050, 3379-3382, 3403-3409, 3441, 3467, 3295-3296. Petitioner would invoke several decisions of the courts of appeals holding that jury trials cannot be claimed in Title VII actions, and would argue that by analogy these authorities should be followed here. It is important to note that this Court has deliberately left open the issue of jury trials in Title VII cases. Curtis v. Loether, 415 U.S. 189, 196-197 (1974). Although there are certain similarities between the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964, there are also important differences, including markedly different agency enforcement procedures and administrative exhaustion requirements (compare 42 U.S.C. sec. 2000e-5 with 29 U.S.C. sec. 626), and the unavailability of class actions

under the Age Discrimination in Employment Act (e.g., LaChapelle v. Owen-Illinois, Inc., 513 F.2d 286 (5th Cir. 1975)).

A jury trial must be provided in an age discrimination case, not only because Congress intended to make it available, but also because the Seventh Amendment requires it. In Ross v. Bernhard, 396 U.S. 531 (1970), and other recent cases of this Court it is established that the Seventh Amendment compels a jury trial if (1) the issue is "legal" rather than "equitable" under the custom of the courts prior to the merger of law and equity, (2) the remedy sought is legal, not equitable, and (3) the issue is triable to the jury given their practical abilities and limitations. James, Right to a Jury Trial in Civil Actions, 72 Yale L.J. 655 (1963).

First, under the Age Discrimination in Employment Act, the issue is "legal" rather than "equitable" under pre-merger custom. A claim of employment discrimination with a prayer for lost wages is analogous to the common law action for breach of contract by wrongful discharge. St. Clair v. Local Union No. 515, 422 F.2d 128 (6th Cir. 1969); Ochoa v. American Oil Company, 338 F.Supp. 914 (S.D.Tex. 1972).

Second, the plaintiff is seeking a legal, not an equitable, remedy. In her complaint she prayed for monetary damages. Although plaintiff's cause of action is a statutory creature and not of common law origin, it is well established that a jury trial is available in causes of action based on modern statutes, where a claim

for legal relief is made. Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Fleitmann v. Welsbach Street Lighting Co., 240 U.S. 27 (1916). In addition to her prayer for monetary damages, plaintiff also requested the equitable relief of reinstatement; this does not dispossess her of her jury trial right, because "there is a right to a jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims." Ross v. Bernhard, 396 U.S. at 538.

Third, the issue is within the practical abilities and limitations of the jurors. The computations of damages are governed by well established formulae, are mathematically simple, and may be reasonably estimated when the exact amount due cannot be ascertained. Wirtz v. Turner, 330 F.2d 11 (7th Cir. 1964); Neal v. Braughton, 111 F.Supp. 775 (D.Ark. 1953). Certainly age discrimination cases do not approach the complexity of accounting actions for trademark violations held to be subject to trial by jury in Dairy Queen, Inc. v. Wood, supra.

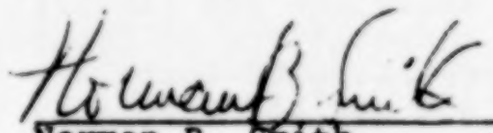
The decision of the court of appeals in the present case is particularly supported by this Court's case of Curtis v. Loether, 415 U.S. 189 (1974). This case holds that there is a Seventh Amendment jury trial right in an action brought under the Fair Housing Law, Title VIII of the Civil Rights Act, 42 U.S.C. sec. 3612, which provides for injunctive relief and both actual and punitive "damages." Relying on Dairy Queen, Inc. v. Wood, and other decisions in a long line of cases

upholding the right to jury in civil actions, the court said, "The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." 415 U.S. at 194.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,



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